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7
8 **THE UNITED STATES DISTRICT COURT**
9 **FOR THE DISTRICT OF NEVADA**

10 ANTHONY SESSA AND MARK SESSA,
individually and on behalf of all others similarly
11 situated,

12 Plaintiffs,

13 v.

14 ANCESTRY.COM OPERATIONS INC., a
15 Virginia Corporation; ANCESTRY.COM, INC.,
a Delaware Corporation; ANCESTRY.COM
16 LLC, a Delaware Limited Liability Company,

17 Defendants.

Case No.: 2:20-cv-02292-GMN-BNW

PLAINTIFFS' PROPOSED TRIAL PLAN

Hon. Gloria M. Navarro

Date:

Time:

Courtroom:

I. INTRODUCTION

Plaintiffs respectfully submit this Trial Plan in support of their class certification motion. Plaintiffs seek to certify a class of Nevada residents alleging that Ancestry used their names and yearbook photographs without their consent in public webpages designed to advertise paid subscriptions to Ancestry.com. Specifically, Plaintiffs seek certification of the following class:

All persons: (1) who are Nevada residents or were Nevada residents at any time between December 17, 2017, and the present; (2) who are not paying subscribers, free trial users, or registered users of Ancestry.com and have never donated a yearbook to Ancestry; and (3) for whom one or more of their yearbook photographs were searchable on Ancestry.com at any time between December 17, 2017, and the present.

This Trial Plan provides a roadmap to aid the Court in assessing how a trial can be conducted in an efficient and manageable manner. It includes information regarding how Plaintiffs intend, subject to the Court's guidance, to present their claims and seek relief at trial in a way that is consistent with the requirements of Rule 23.

II. SCOPE AND LENGTH OF TRIAL

Plaintiffs' Nevada's statutory right of publicity, Nev. Rev. Stat. §§ 597.770 *et seq.* ("NRPA") claims are tried to the jury. Plaintiffs propose that the NRPA claim, *i.e.* "whether Ancestry's advertisements are a "commercial use . . . of the name . . . photograph or likeness of a person," and all other issues be tried together in a single jury trial. *See* Nev. Rev. S. § 597.790(1); Compl., at ¶¶22-45 (showing advertisements as they appear for Plaintiffs). Subject to the Court's guidance and rulings, Plaintiffs would seek to present testimony from the named Plaintiffs, Plaintiffs' accounting expert, and certain Ancestry employees and other witnesses. The length of the trial will depend in part on the extent to which the parties can streamline the presentation through various stipulations and also any case that Ancestry wishes to present. Excluding jury selection, Plaintiffs' current estimate is that trial can be completed in approximately five court

1 days. Subject to the Court's availability, Plaintiffs are prepared to proceed to trial as early as April
2 2023.

3 **III. STIUPULATED FACTS**

4 Subject to the Court's availability, Plaintiffs are prepared to proceed to trial as early as
5 April 2023. For many elements of Plaintiffs' claims, Plaintiffs believe that the parties can
6 streamline the trial by stipulating to certain facts. Those stipulated facts could include, for example:
7 (1) the flow of the Ancestry website; (2) that Ancestry does not obtain consent from each yearbook
8 photograph subject to use their photograph on Ancestry.com and to advertise Ancestry.com
9 subscriptions; and (3) that Ancestry obtains revenue through subscription purchases to
10 Ancestry.com.
11

12 **IV. PROCEDURES TO SIMPLIFY TRIAL PRESENTATION**

13 The parties will prepare for trial consistent with Your Honor's Order Regarding Trial
14 and Chambers Practices and endeavor to proceed efficiently and cooperatively.
15

16 **V. COMMON ISSUES AND EVIDENCE**

17 There are many questions of law and fact common to the proposed Class, including:

- 18 • Whether Ancestry used Class members' names and likenesses to advertise
19 website subscriptions in advertisements identical or substantially similar to
20 those shown and described in the Complaint;
- 21 • Whether Ancestry's regular practices and policies include obtaining written
22 consent from Class members prior to using their names and likenesses;
- 23 • Whether Ancestry ascribes economic value to and derives an economic
24 benefit from its commercial use of Class members' names and likenesses;
- 25 • Whether the provision for statutory damages in the NRPA entitles each
26 Class member to \$750 for each of their yearbook photographs Ancestry
27 used to advertise subscriptions;
- Whether Class members are entitled to injunctive relief, including (1)
changes to the Ancestry website that would de-associate the display of Class
members' names and yearbook photographs from solicitations for the

1 purpose of a website subscription, and/or (2) Ancestry obtaining written
2 consent before making commercial use of Plaintiffs' names and
3 photographs.

4 Each of these questions will be answered with common proof. First, Plaintiffs will present
5 the flow of the Ancestry.com website to demonstrate that Plaintiffs' and Class members'
6 photographs are used to advertise subscriptions to Ancestry.com. Second, Plaintiffs will present
7 evidence, both through testimony from Ancestry employees and from the Plaintiffs, as well as
8 through documents produced by Ancestry, showing that Ancestry does not obtain consent from
9 Class members prior to using their name and likeness on Ancestry.com. Third, Plaintiffs will
10 show that Ancestry ascribes economic value to Class members' names and likenesses. This
11 will be proven through documents showing that Ancestry licenses and purchases yearbooks to
12 display on Ancestry.com for which it obtains subscription revenue and that PeopleConnect
13 licenses yearbook access to other third parties for which it obtains licensing revenue. Fourth,
14 as a result of this foregoing common evidence, Plaintiffs and the Class are each entitled to
15 statutory damages of \$750 for each yearbook photograph illegally used by Ancestry. Finally,
16 Plaintiffs will show through testimony from Ancestry employees and documents produced by
17 Ancestry that Ancestry continues to use Plaintiffs' and Class members' names and likenesses to
18 advertise subscriptions to Ancestry.com today, thus entitling Plaintiffs to injunctive relief.
19

20 **VI. NOTICE PROGRAM AND POST-JUDGMENT ADMINISTRATION**

21 With respect to any aggregate award against Ancestry, Plaintiffs will employ a
22 generally applicable, class-wide methodology to divide any recovery among Class Members. The
23 statutory damages available under the NRPA will provide a framework for distribution of any
24 recovery. Plaintiffs will present a claims administration protocol for the Court's review and
25 approval, which will govern post-judgment submission, processing, and resolution of claims with
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1 the goal of maximizing class member participation and making recovery simple and
2 straightforward.

3 **VII. CONCLUSION**

4 The parties will prepare for trial consistent with Your Honor's Guidelines for Trial in
5 Civil Cases and endeavor to proceed efficiently and cooperatively. As set out in this Trial Plan,
6 Plaintiffs respectfully seek the opportunity to use common, class-wide evidence to establish
7 liability and damages, where trying this matter as a class action is consistent with Rule 23's
8 requirements and the due process rights of the parties while assuring a streamlined and efficient
9 trial.
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Dated: December 6, 2022

By: /s/ Miles N. Clark
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CERTIFICATE OF SERVICE

I hereby certify that on December 6, 2022, and pursuant to the Federal Rules of Civil Procedure, a true and correct copy of the foregoing **PLAINTIFFS' PROPOSED TRIAL PLAN** was served via the U.S. District Court's electronic filing system to all individuals entitled to receive service thereon.

/s/ Lucille Chiusano
An employee of The Law Offices of Miles Clark